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SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1951

No. 706

SAFEWAY STORES, INCORPORATED,
Petitioner,

vs.

ELLIS ARNALL, DIRECTOR OF PRICE STABILIZATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Safeway Stores, Incorporated, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Emergency Court of Appeals, rendered on March 13, 1952.

Jurisdiction

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by Section 408(d) of the Defense Production Act of 1950, as amended.

Opinions Below

The opinion of the Emergency Court of Appeals is printed in the record (R. 55).

Questions Presented

The questions presented by this petition are:

1. Whether the Statement of Considerations accompanying the issuance of a ceiling price regulation constitutes, for the purposes of protest and judicial review, an integral part of such a regulation.

2. If so, then, when such a Statement of Considerations contains a promise of a certain and specific action by the Director, whether such a promise is binding upon him.

3. If his promise is binding, then whether a delay of more than one year in carrying it out constitutes arbitrary and capricious action;

4. Whether the failure of the Director of the Office of Price Stabilization to keep his promise constitutes new grounds for protest after the lapse of the six months statutory period when one who had relied on that promise learned definitely for the first time the action promised would not be taken for another period of approximately six months or more.

5. Whether the failure of Respondent to keep his promise, made on March 28, 1952, violates the requirements of Section 402(c) of the Defense Production Act of 1950, as amended, that his regulations shall be generally fair and equitable and whether such failure constituted new grounds for protest by Petitioner.

6. Whether the extension of the Defense Production Act of 1950, as of August 1, 1951, for a period of eleven months, in effect extended the life of Ceiling Price Regulation 15, thus so changing petitioner's circumstances of operations as to create a new impact upon said operations, and hence new grounds for protesting Ceiling Price Regulation 15.

Statutes Involved

Defense Production Act of 1950, 64 Stat. 798, 50 U.S.C. App. § 2061, et seq., as amended by the Defense Production Act Amendments of 1951, 65 Stat. 275; and more particularly Sections 402(c), 407(a) and 408(d) of the Act, as amended, which are set forth in the Appendix.

Statement

On March 28, 1951, Respondent issued Ceiling Price Regulation 15 (hereinafter known as "CPR 15").

On January 26, 1951, Respondent had issued a General Ceiling Price Regulation designed to freeze all prices at the highest level charged by any seller during a base period fixed therein as December 19, 1950, to January 25, 1951. CPR 15 was issued to remove dry groceries from General Ceiling Price Regulation and place them under a regulation providing specific markups for particular items or groups of items.

CPR 15 as issued designated April 5, 1951, as its "effective date," although the pricing provisions therein were not to become mandatory until April 30, 1951. Effective April 27, 1951, the date for mandatory pricing under CPR 15 was extended to May 14, 1951.

In the Statement of Considerations to CPR 15, Respondent admitted that the General Ceiling Price Regulation, which froze virtually all prices on January 25, 1951, was issued essentially as a "stop gap" measure in order to bring under immediate controls prices of most goods and services. He further admitted that at the time of issuance of General Ceiling Price Regulation he recognized that the freeze regulation was not well adapted to the long range control of prices in many parts of the economy, and that this was true of the wholesaling and retailing of food. He further admitted that between the outbreak of the Korean war, and

the freeze period, some food distributors had placed in effect substantial price increases beyond those necessitated by increased costs, and that others had not so advanced their prices. Respondent recognized that the freeze technique rewarded those who had increased their prices most. Respondent further recognized that distortions in the cost-price relationships and the chance abnormalities that had existed in the base period were frozen into the price structure (R. 27).

In his Statement of Considerations, accompanying CPR 15, Respondent said that the best markups on dry grocery items available to him were those used by the OPA ten years ago. He admitted that the chain stores and supermarkets had presented calculations showing that application of OPA markups to pre-Korea operations would reduce by approximately 3% on sales the grocery department gross margins experienced at that time and that such ceilings would mean loss operations rather than profit operations. Respondent admitted that an examination of the data submitted by the chain and supermarkets indicated that "there is a substantial basis for these figures" (R. 28).

Nevertheless, Respondent increased the OPA markups by a little more than 1%, rather than by the 3% shown by the chains and supermarkets as essential to modestly profitable operations, basing this adjustment on his opinion, expressed in the absence of any finding of facts to support it, that food costs and prices rise faster than the retailers' overhead and other expenses.

Respondent stated, however, that he was "*now organizing a study of margin and earning figures for food distributors in order to obtain more recent comprehensive data.*" (Emphasis supplied.) (R. 28.)

In respect of this survey, Respondent then made this promise:

> "If the study should indicate that the ceiling prices established under this regulation are either too low or too high, *the regulation will be promptly revised to reflect the results of the survey.*" (Emphasis supplied.) (R. 28.)

Also, in respect of the adjustments which he made in some of the ten year old OPA markups, Respondent said:

> "These adjustments will be carefully checked against the results of the survey." (R. 28.)

At the time Respondent issued CPR 15, the law under which he acted was due to expire on June 30. Thus the legal life of the regulation when issued was less than four months and the legal life from its effective date less than two months.

Subsequently, by joint resolution Congress extended the Act for one month, and then on August 1, 1951, extended its life for a period of eleven months. In so doing, however, Congress amended the Act in various particulars.

Between March 29, 1951, and June 30 (the date of the expiration of the Act) and August 1, the date on which it was extended with amendments, nothing was done about the promised survey.

Then, on August 16, 1951, Respondent in a press release announced that a nation-wide survey of grocery price markups had been outlined that day at a joint meeting of the Wholesale and Retail Food Distributors Industry Advisory Committee.[1]

On October 1, 1951, in another press release, the Respondent said a nation-wide survey was getting under way with "pre-tests" in New York City and Columbus, Ohio. These pre-tests, he estimated would take about three weeks, including analysis of results, after which work would start on a nation-wide sample of cities and rural areas.

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[1] This Court may take official notice of this and other press releases cited by Petitioner in its brief in the court below.

On October 2, 1951, in the Statement of Considerations accompanying the issuance of Amendment 8 to CPR 15, Respondent said:

> "However, the Office of Price Stabilization is now organizing a study of margins of food distributors in order to obtain more comprehensive data. If the study should indicate that the ceiling prices established under this amendment are either too low or too high, the regulation will be promptly revised to reflect the results of the survey."

On December 7, 1951, in a press release of the Respondent, entitled *Retail Food Distributors IAC*, Respondent said that OPS officials told the Retail Food Distributors Industry Advisory Committee that

> "• • • an overall markup survey is to get underway the first of next year to determine whether the grocery ceiling price regulations have had an adverse effect on the earnings of grocers, or whether in some cases they are too high."

On January 18, 1952, Edward F. Phelps, Jr., Assistant to Respondent, told the National American Wholesale Grocers' Association Convention at Atlantic City that

> "We are in the process of running markup and earnings surveys to help determine how and to what extent adjustment should be provided."

On January 23, 1952, Respondent issued Amendment 10 to CPR 15 fixing dollars and cents ceiling prices for white potatoes sold in Group 3 and Group 4 stores. Petitioner is affected by this regulation.

In his Statement of Considerations accompanying the issuance of Amendment 10, Respondent stated that the adjustments provided therein "are supported by recent data" but, however, "like the markups fixed for 'dry groceries,' the markups for white potatoes now fixed by this amend-

ment are subject to re-examination in the light of the result of the forthcoming survey of pre-Korean margins."

In a press release issued February 28, 1952, Respondent said:

> "A nation-wide survey of percentage markups in use by wholesale and retail grocers in the period immediately preceding the outbreak of war in Korea will get under way March 10, the Office of Price Stabilization announced today.
>
> "The survey, which will be conducted by OPS in cooperation with the Bureau of Labor Statistics, will be a study of the differences between costs and selling prices—what a grocer paid for an item and what he sold it for.
>
> "These differences are known as 'margins.' When these margins are expressed as percentages over cost, they are called markups.
>
> "Purpose of the survey, OPS said, is to find out how the markups used in the agency's wholesale and retail grocery ceiling price regulations compare with the markups resulting from the margins grocers were using in the pre-Korea period, May 24-June 24, 1950.
>
> "The present OPS grocery markups are substantially the same as those used during World War II by the Office of Price Administration. The survey is designed to determine whether there should be any changes in these markups due to changes in food marketing practices since OPA days.
>
> • • • • • • •
>
> "Months of preliminary work have gone into preparing for the survey which is expected to require about five weeks to complete.
>
> • • • • • • •
>
> *"Recognizing the need for more up-to-date data, OPS promised, when it issued the grocery regulations, that it would conduct its own survey as soon as one could be organized."* (Emphasis supplied.)

This Court can take official notice of a press release issued March 7, 1952, in which Respondent said:

> "Names of the 139 cities and towns to be included in the OPS Food Margin Survey were announced today by the Office of Price Stabilization. The survey, details of which were announced by OPS on February 28, is a nation-wide study of percentage markups used before Korea by wholesale and retail grocers.
>
> "The survey will start Monday, March 17, and will cover the markups used by grocers during the pre-Korea month, May 24-June 24, 1950.
>
> "The survey was originally scheduled to get started on March 10 but, because of difficulties in getting the materials distributed, will not get generally underway before the following Monday."

In November, 1951, petitioner came to the realization that Respondent's promise was not going to be kept and that no adequate steps had been taken by Respondent to keep it. Therefore, on November 23, 1951, petitioner filed with Respondent a protest against CPR 15, alleging as new grounds therefor the determined fact that there was no likelihood "that the regulation will be promptly revised to reflect the results of the survey" (R. 3, 28).

Petitioner's protest was dismissed by Respondent on December 20, 1951, on the ground that it had not been filed within the period specified for protest in Section 407(a) of the Act (R. 21).

On January 16, 1952, petitioner filed a complaint with the Emergency Court of Appeals (R. 39). Respondent moved to dismiss on the ground that the protest had not been timely filed (R. 48).

On March 13, 1952, the Emergency Court of Appeals granted Respondent's motion and dismissed the complaint (R. 54).

Specification of Errors

The Emergency Court of Appeals erred as follows:

1. In granting Respondent's motion to dismiss.

2. In failing to hold that Respondent was obligated to keep the promise made in his Statement of Considerations to conduct a survey and promptly revise the regulation in the light of the results thereof.

3. In holding that the failure of Respondent to keep his promise within a reasonable time did not constitute new grounds for protest when petitioner learned that the promise could not and would not be kept for another period of months.

4. In failing to hold that Respondent's dilatory tactics in respect of organizing and conducting the promised survey and making the adjustments required thereunder were arbitrary and capricious and in violation of Section 402(c) of the Act.

5. In holding that CPR 15 was generally fair and equitable in its inception and that the failure of Respondent to make and complete the promised survey and adjustments did not render the regulation unfair and inequitable.

6. In holding that the extension of the Defense Production Act of 1950 as of August 1, 1951, for a period of eleven months did not in effect extend the life of CPR 15 in such a manner as to change petitioner's circumstances of operations and to create a new impact upon said operations constituting new grounds for protesting CPR 15.

Reasons Relied On for Granting the Writ

The court below has decided important questions of federal law which have not been but should be settled by this Court.

I

Respondent has arbitrarily and capriciously refused to carry out his promise to conduct a survey on grocery margins after having admitted that the margins fixed in his regulation were not based on a proper finding of fact.

The record in this case shows that at the time Respondent issued CPR 15 he made a guess as to the fairness of the percentage markups fixed for retail ceiling prices on dry groceries, that he made his guess upon the basis of markups used by the Office of Price Administration more than ten years before and during World War II, that he recognized that there was a "substantial basis" for the industry's opposition to the adoption of such markups, that he accompanied the issuance of CPR 15 with a promise to make a nation-wide survey in an effort to obtain more recent comprehensive data on margins and earning figures, and that he would adjust the ceiling prices set by CPR 15 in the light of that study, which promise he has not to this day carried out (R. 28).

At the time Respondent issued his regulation and made his promise to make a survey and any adjustments required thereby, the law by its precise terms was due to expire on June 30, 1951. No action whatsoever was taken by Respondent in respect of his promise prior to June 30. Subsequent to that date and on or about August 1 Congress reenacted the law with certain amendments. Two weeks later Respondent again promised to make a survey and to make adjustments indicated thereby. However, he took no action such as he had promised.

The Court below in effect held that the promise was meaningless; that it did not imply or require prompt action by Respondent; that the promised survey, considered together with extension of the Act, did not extend the time of protest

as fixed in Section 407(a) of the Act; and that the failure of the Respondent to act expeditiously and within a reasonable period of time did not constitute new grounds for protest by one adversely affected by the regulation.

It has been held time and time again by this Court that administrative orders based upon arbitrary and capricious actions of administrative agencies are void. *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495 (1935); *United States* v. *Baltimore & O. R. Co.,* 293 U. S. 454 (1935); *Texas & P. R. Co.* v. *United States,* 289 U. S. 627 (1933); *Waite* v. *Macy,* 246 U. S. 606 (1918).

It has been held by this Court time and time again that administrative orders issued in the absence of findings of fact are void. *North Carolina* v. *United States,* 325 U. S. 507 (1945); *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475 (1942); *Schechter Poultry Corp.* v. *United States, supra; Atchison, T. & S. F. R. Co.* v. *United States,* 295 U. S. 193 (1935); *United States* v. *Chicago, M., St. P., & P. R. Co.,* 294 U. S. 499 (1935); *United States* v. *Baltimore & O. R. Co., supra; Mahler* v. *Eby,* 264 U. S. 32 (1924).

II

Petitioner was entitled to rely on Respondent's promise set out in the Statement of Considerations to CPR 15.

The questions presented below and presented again here deal not only with good faith on the part of this Government Agency, represented by Respondent, but they deal with the rights of a citizen to rely on Respondent's promise.

The decision below is in conflict with the decision of the Emergency Court of Appeals in *Allied Food* v. *Bowles,* 151 F. 2d 449.

In the *Allied Food* case the Emergency Court of Appeals held that a complainant was entitled to rely upon the Price

Administrator's Statement of Considerations accompanying the issuance of a regulation.

In the instant case the Court said:

> "The mere fact that the respondent has failed to complete such a study (as he promised) with respect to the effect of CPR 15 could not of itself operate to render that regulation no longer generally fair and equitable if it was generally fair and equitable at its inception." (Parenthetical insert supplied.)

The Court below did not pass upon the question as to whether the regulation was fair and equitable at the time it was issued, although this question was raised in the complaint. The Court below failed to do so, even though the question before the Court was solely whether or not a complainant who relied upon Respondent's promise to correct unfairness and inequity within a reasonable time lost its right of protest because it had not ascertained until a few days after the statutory period for protest had expired that Respondent had no intention of keeping his promise within a reasonable period of time.

On this point the Court said:

> "The fact that new grounds of objections have arisen cannot operate to reopen the protest grounds then barred from protest by the six months limitation by Section 407(a)."

At no time did the Court consider the merits of the case as to whether CPR 15 was generally fair and equitable at the time of its issuance.

What the Court in effect did in granting Respondent's motion to dismiss the complaint below was to inform petitioner that it had mistakenly relied upon the Statement of Considerations issued by Respondent and having failed to protest within the statutory period, the mere fact that it learned a few days after that period had expired that the promise

contained in the Statement of Considerations was not going to be kept within a further reasonable time, petitioner had lost all rights to protest the regulation, the unfairness and the inequity thereof notwithstanding.

The Defense Production Act of 1950 in essence is a successor act to the Emergency Price Control Act as it was first enacted and subsequently amended during World War II. At the time the Emergency Price Control Act was submitted to Congress, the General Counsel of the Office of Price Administration appeared before the Senate Banking and Currency Committee and stated that in providing for Statements of Considerations accompanying the issuance of regulations a standard had been used, that in fact had been devised by the Courts, and that the basis of that standard was whether the action taken "is in accordance with law or is arbitrary or capricious."

Subsequently, the General Counsel of the Office of Price Administration filed a brief with the Senate Committee in which he stated that:

> "Price ceiling regulations, * * * are to be issued by the Administrator after full inquiry. Each regulation must be accompanied by a statement of the economic considerations justifying its issuance. This requirement insures responsible and considered action by the Administrator and gives notice to protestants of the essential basis of the Administrator's price action. Thus, the protestant can direct his objection to the precise issues which determine original action and can shape his evidence and arguments into the most effective form. The issuance of a statement of consideration will, in fact, sharpen the issue in every stage of administrative reexaminaiton." Hearings before the Senate Committee on Banking and Currency, H. R. 5590, 77th Congress, 1st Session, pp. 178, 249.

The House Committee on Banking and Currency when it reported the bill, which subsequently was considered by the

Senate, in its report said that the Statement of Considerations provided for in the bill

> "will afford those subject to a price ceiling an adequate opportunity to know the basis for its adoption and to formulate in the form of protest * * * any objections which they may have to the price ceiling." 77th Congess, 1st Session, H. R. Report 1409, p. 5.

The report of the Senate Committee on Banking and Currency on the Emergency Price Control Act sets forth:

> "This statement (of Considerations) will afford those subject to a maximum price regulation an adequate opportunity to know the basis for its adoption and therefore, intelligently to formulate, in the form of protests * * * any objections which they may have to such regulation."

The Senate further said:

> "The statement of considerations underlying the Administrator's action served 'to expose to public scrutiny and criticism the grounds upon which the price regulations are based. The Administrator, in order to retain public confidence and support, will thereby be required to identify the problems arising in connection with each price regulation and to indicate the reasons for his actions.'" Senate Report No. 931, 77th Congress, 2d Session, pp. 7 and 15.

In this case the Respondent issued a regulation not on the basis of any findings of fact but on the basis of a pure guess accompanied by a promise to make findings of fact and the appropriate adjustments in the regulation required by those findings. Petitioner was entitled to rely on this promise which was not kept prior to the scheduled expiration of the Act, and has not been kept yet.

III

The extension of the Defense Production Act of 1950 as of August 1, 1951 for a period of eleven months in effect extended the life of CPR 15, thus so changing petitioner's circumstances of operations as to create a new impact upon said operations and hence new grounds for protesting CPR 15.

When CPR 15 was issued on March 28, 1951, the Defense Production Act of 1950 was destined to expire on June 30, 1951. Therefore, Respondent had no authority to do more than tell petitioner and others similarly situated that:

> "The ceiling price provided herein, and as I intend to adjust them to reflect the results of the survey which I am organizing, will be binding upon you henceforth until the expiration of the authority heretofore given me by Congress, that is, beginning with the effective date of CPR 15 and ending June 30, 1951."

Thus, Respondent was in fact imposing price controls on the subject items from May 14, 1951 (the final effective date of the pricing provisions of CPR 15) until June 30, 1951.

He had no authority to do more.

Subsequently Congress granted him two extensions of authority. The first was for a period of one month from June 30 to July 31, 1951. The second was for a period of eleven months from August 1, 1951, until June 30, 1952.

In extending the Act for a period of eleven months from August 1, 1951, Congress *ipso facto* gave Respondent new authority and embraced in that authority was the statutory extension of the life of CPR 15.

Instead of passing into oblivion as it necessarily would have done under the authority pursuant to which it originally was issued, CPR 15 again was imposed upon Petitioner and others similarly situated in accordance with new statutory authority.

Thus Petitioner was, after August 1, 1951, governed by CPR 15, whereas under the authority of the original regulation, there was no legal contemplation of effect after June 30, 1951. This change in circumstances created a "new impact" upon Petitioner and consequently new grounds for the filing of a protest against CPR 15. Instead of contemplating being subject to the regulation only until June 30, 1951—a period of one and one-half months from the effective date of the pricing provisions, a period much shorter than that required to effectuate protest proceedings —Petitioner could, as of August 1, 1951, visualize a total of thirteen and one-half months of controls under CPR 15, i. e., until June 30, 1952.

It is clear that if Respondent had specified in CPR 15 that the Regulation was to expire on June 30, 1951, and if he had subsequently amended the Regulation to extend its effect until June 30, 1952, such amendment would have constituted new grounds on which a protest might be based. The continuation of controls into a period into which no controls had previously been projected would certainly produce a "new impact" upon Petitioner's operations. To contend that this would not affect the circumstances of Petitioner's operations enough to constitute new grounds on which to base a protest would shock the common sense of justice. Yet there can be no reasonable distinction between that case and this one, where Congress had specified that the statutory authority of Respondent, and hence the Regulation, was to expire on June 30, 1951, and Congress subsequently extended the Act until June 30, 1952, thus again projecting the effect of CPR 15 into a period into which no controls had previously been projected. In either case it would be the same as though, on August 1, 1951, a new regulation had been issued, covering a new period of time.

IV

The failure of Respondent to keep his promise, made on March 28, violates the requirements of Section 402(c) of the Act that his regulations shall be generally fair and equitable. Therefore when Petitioner learned the promise would not be fulfilled in a reasonable time, new grounds for protest arose.

The Act requires that all regulations issued thereunder shall be generally fair and equitable. At the time CPR 15 was issued, Respondent in effect admitted in his statement of considerations that it was issued as a temporary measure to cure inequities in the original General Ceiling Price Freeze Regulation, and without current or even recent data to support the margins applied. He made a guess as to what he thought would be proper margins, but admitted that the industry of which this Petitioner is one, challenged his guess and had furnished data to demonstrate it would not give to the industry margins representative of those prevailing during the period May 24—June 24, 1950, as required by Section 402(c) of the Act. To meet this challenge to his guess, he promised the survey.

His guess was palpably wrong.

He has not kept his promise.

He has resorted to subterfuge in an effort to defeat Petitioner's right to obtain fair and equitable treatment, by asking the court below to dismiss the complaint, because, as he alleged, it was not filed within the statutory period and his failure to keep his promise within a reasonable period offered no new ground for protest.

It is respectfully submitted that in the light of Section 402(c) of the Act, requiring that regulations shall be generally fair and equitable, Respondent's failure to carry out his promise constituted new grounds upon which a protest to CPR was properly based.

Conclusion

In dismissing the complaint on Respondent's motion, the Court below decided federal questions far from the accepted and usual course of judicial proceeding, as well as in conflict with its own decisions.

Therefore, it is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory powers of this Court.

Respectfully submitted,

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APPENDIX

Section 402(c). Defense Production Act of 1950, as amended.

So far as practicable, in exercising the authority conferred in this section, the President shall ascertain and give due consideration to comparable prices, rentals, commissions, margins, rates, fees, charges, and allowances, and to comparable salaries, wages, or other compensation, which he finds to be representative of those prevailing during the period from May 24, 1950, to June 24, 1950, inclusive, or, in case none prevailed during this period or if those prevailing during this period were not generally representative because of abnormal or seasonal market conditions or other cause, then those prevailing on the nearest date on which, in the judgment of the President, they are generally representative. The President shall also give due consideration to the national effort to achieve maximum production in furtherance of the objectives of this Act. In determining and adjusting ceilings on prices with respect to materials and services, he shall give due consideration to such relevant factors as he may determine to be of general applicability in respect of such materials or service, including the following: Speculative fluctuations, general increases or decreases in cost of production, distribution and transportation, and general increases or decreases in profits earned by sellers of the material or by persons performing the service, subsequent to June 24, 1950. In stabilizing and adjusting wages, salaries or other compensation, the President shall give due consideration to such relevant factors as he may determine to be of general applicability in respect of such wages, salaries, or other compensation. Any regulation or order under this title shall be such as in the judgment of the President will be generally fair and equitable and will effectuate the purposes of this title, and shall be accompanied by a statement of considerations involved in the issuance of such regulation or order. The President, in establishing and adjusting ceiling with respect to materials and services, and in stabilizing and adjusting wages, salaries, and other compensation, shall make such adjustments

as he deems necessary to prevent or correct hardships or inequities.

Section 407(a). Defense Production Act of 1950, as amended.

At any time within six months after the effective date of any regulation or order relating to price controls under this title, or, in the case of new grounds arising after the effective date of any such regulation or order relating to price controls, within six months after such new grounds arise, any person subject to any provision of such regulation or order may, in accordance with regulations to be prescribed by the President, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. Statements in support of any such regulation or order may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the President. Within a reasonable time after the filing of any protest under this section, but in no event more than thirty days after such filing, the President shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the President denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the president has taken official notice.

Section 408(d). Defense Production Act of 1950, as amended.

Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. The Supreme Court shall advance on the docket and expedite the disposition of all causes filed

therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order relating to price controls issued under this title, and of any provision of any such regulation or order. Except as provided in this section, no court, federal, state, or territorial, shall have jurisdiction or power to consider the validity of any such regulation or order relating to price controls, or to stay, restrain, enjoin, or set aside in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 706

SAFEWAY STORES, INCORPORATED, PETITIONER

v.

ELLIS ARNALL, DIRECTOR OF PRICE STABILIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Emergency Court of Appeals (R. 55) is reported at 195 F. 2d 319.

JURISDICTION

The judgment of the Emergency Court of Appeals (R. 59) was entered on March 13, 1952. The petition for a writ of certiorari was filed on April 12, 1952. The jurisdiction of this Court is invoked under Section 408 (d) of the Defense Production Act of 1950 (Act of September 8, 1950, 64 Stat. 798, 808, 50 U. S. C. App. (Supp. IV) 2108).

QUESTIONS PRESENTED

1. Whether failure of the Office of Price Stabilization to complete a study of margins and earnings of food distributors announced in the Statement of Considerations of a ceiling price regulation constitutes "new grounds" within the meaning of Section 407 (a) of the Defense Production Act of 1950, which permits the filing of a protest within six months after the "effective date" of a regulation or within six months after "new grounds" for a protest arise.

2. Whether Congressional extension of the life of the Defense Production Act of 1950 constitutes such "new grounds."

STATUTE INVOLVED

Section 407 (a) of the Defense Production Act of 1950 (Act of September 8, 1950, 64 Stat. 798, 807, 50 U. S. C. App. (Supp. IV) 2107) provides as follows:

> At any time within six months after the effective date of any regulation or order relating to price controls under this title, or, in the case of new grounds arising after the effective date of any such regulation or order relating to price controls, within six months after such new grounds arise, any person subject to any provision of such regulation or order may, in accordance with regulations to be prescribed by the President, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in sup-

port of such objections. Statements in support of any such regulation or order may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the President. Within a reasonable time after the filing of any protest under this section, but in no event more than thirty days after such filing, the President shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the President denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the President has taken official notice.

STATEMENT

This suit arises out of the dismissal by the Director of Price Stabilization of a protest, filed by petitioner on November 23, 1951, alleging that Ceiling Price Regulation No. 15 (CPR 15) is "unfair and inequitable as it is applied to Protestant and to others similarly situated" (R. 3). The protest was dismissed as not timely filed (R. 21–25) under Section 407 (a) of the Defense Production Act (64 Stat. 807, 50 U. S. C. App. (Supp. IV) 2107) which permits the filing of a protest "within six months after the effective date of any regulation or order * * * or, in

the case of new grounds arising after the effective date of any such regulation or order * * * within six months after such new grounds arise * * *."

The relevant facts are not in dispute and are as follows:

CPR 15 was issued March 28, 1951, effective April 5, 1951 (16 F. R. 2735). Its pricing provisions were made mandatory as of April 30, 1951, which date was later extended to May 14, 1951 (16 F. R. 3650). It provides in general for a percentage markup-on-cost method of establishing ceiling prices similar to that employed by the Office of Price Administration under the Emergency Price Control Act of 1942. To facilitate prompt issuance of the regulation, the Office of Price Stabilization used the markups established by OPA during the years 1943 to 1946, recognizing, however, that in some categories "markups have changed substantially since the war." The Statement of Considerations accompanying the regulation read in part as follows: "The Office of Price Stabilization is now organizing a study of margin and earning figures for food distributors in order to obtain more recent comprehensive data. If the study should indicate that the ceiling prices established under this regulation are either too low or too high, the regulation will be promptly revised to reflect the results of the survey."

Petitioner did not file its protest within six

months after the effective date of CPR 15,[1] but claimed that the failure of the Director of Price Stabilization to complete the survey "promised" in the Statement of Considerations within a reasonable time constituted new grounds within the meaning of Section 407 (a), thus extending the time within which a protest could be filed.

After the Office of Price Stabilization dismissed the protest on the ground that the failure to complete the survey did not constitute "new grounds" for challenging CPR 15 (R. 21), petitioner filed a complaint in the Emergency Court of Appeals based on the grounds urged in its protest (R. 39). In its brief in that court it claimed for the first time, as additional new grounds within the meaning of Section 407 (a), the extension of the life of the Defense Production Act to June 30, 1952 (by the Defense Production Act Amendments of 1951, Act of July 31, 1951, 50 U. S. C. A. App. 2166) (R. 57).

The Emergency Court of Appeals dismissed the complaint, holding that no new grounds for protest had been shown by petitioner and that the respondent had properly dismissed petitioner's protest against CPR 15.

[1] The regulation as issued prescribes April 5, 1951, as the "effective date" although the pricing provisions were not to become mandatory until April 30, 1951. The date for mandatory prices was subsequently extended to May 14, 1951. The protest was filed on November 23, 1951, more than six months after the latest of those dates.

ARGUMENT

The decision below correctly interpreted the requirement of Section 407 (a) of the Defense Production Act that a protest, to be timely, must be filed "within six months after the effective date of [the] regulation * * * or, in the case of new grounds arising after the effective date of [the] regulation * * * within six months after such new grounds arise * * *." Petitioner did not, of course, file its protest within six months after the "effective date" of CPR 15. And neither the failure of the Director to complete a survey of margins nor the extension of the Defense Production Act reopens the time for filing a protest within the meaning of the statute.

1. Failure to complete the survey announced in the Statement of Considerations accompanying CPR 15 cannot satisfy the requirement of Section 407 (a) that "new grounds" support the filing of a protest more than six months after the effective date of a price regulation. The statute plainly contemplates that a price order or regulation must be challenged within six months of its effective date, or not at all. The "new grounds" provision permits a later challenge only where subsequent changes in circumstances render the regulation no longer generally fair and equitable. And the right to file a protest by reason of "new grounds" is limited to those aspects of the regulation affected by the new grounds. This was the interpretation of the Emergency Price

Control Act of 1942 (*Harlem Metal Corp.* v. *Brown,* 136 F. 2d 242, 244 (E. C. A.); *Bibb Mfg. Co.* v. *Bowles,* 140 F. 2d 459, 461 (E. C. A.)), which presumably was incorporated in the Defense Production Act by adoption of a comparable provision in Section 407 (a).[2] See Senate Report No. 2250, 81st Cong., 2d Sess., p. 40. But petitioner does not contend that CPR 15 was initially fair and equitable and has become unfair because of the failure to modify it. Its protest is directed solely against the initial validity of CPR 15. Since no timely protest was filed, however, the validity of the regulation as originally issued must be assumed. In the absence of changed circumstances, CPR 15 is now immune from attack. To permit an allegation of continued unfairness to reopen a regulation to protest, without requiring a showing that new conditions alter its effect, would render meaningless the six months' limitation period.

The argument implicit in petitioner's asserted "new grounds," that it was entitled to wait a reasonable time because the Director postponed

[2] Section 203 (a) of the Emergency Price Control Act of 1942 (56 Stat. 23, 31) prescribed a sixty-day period for the filing of protests and provided that "at any time after the expiration of such sixty days any persons * * * may file * * * a protest based solely on grounds arising after the expiration of such sixty days." Section 203 (a) was amended by the Act of June 30, 1944 (58 Stat. 632, 638) to remove the limitation provision; as amended, it permitted the filing of a protest "at any time."

a finding of fairness until the survey had been completed,[3] is refuted by the terms of the regulation itself. The Statement of Considerations discloses that the Director of Price Stabilization gave careful consideration to the claims of the chain stores and supermarkets that the OPA markups were inadequate and to the data presented in support of these claims (R. 28). In some food categories, where the data indicated that markups had changed substantially since the war, some adjustments were made in issuing the regulations (R. 28). It was pointed out, however, that a substantial increase in food prices which had occurred since the war, as well as "a marked and rapid increase in physical

[3] Petitioner has not been a sluggard suitor in challenging price control regulations in the past. See *Safeway Stores, Inc.* v. *Brown*, 138 F. 2d 278 (E. C. A.), certiorari denied, 320 U. S. 797; *Safeway Stores, Inc.* v. *Bowles*, 145 F. 2d 836 (E. C. A.), certiorari denied, 324 U. S. 847; *Safeway Stores, Inc.* v. *Bowles*, 145 F. 2d 846 (E. C. A.); *Safeway Stores, Inc.* v. *Porter*, 154 F. 2d 656 (E. C. A.), certiorari denied, 328 U. S. 863; *Safeway Stores, Inc.* v. *DiSalle*, No. 583, Emergency Court of Appeals, decided January 18, 1952; *Safeway Stores, Inc.* v. *DiSalle*, No. 585, Emergency Court of Appeals, decided October 9, 1951, certiorari denied, 342 U. S. 903; *Safeway Stores, Inc.* v. *Arnall*, No. 590, now pending before the Emergency Court of Appeals; *Safeway Stores, Inc.* v. *Arnall*, No. 591, decided May 5, 1952; *Safeway Stores, Inc.* v. *Arnall*, No. 598, decided April 3, 1952; *Safeway Stores, Inc.* v. *Arnall*, No. 599, decided May 12, 1952.

It should be noted that No. 591 involved a protest filed in due time against CPR 15.

volume," permitted food distributors to realize adequate dollar margins despite the possibility of a slight reduction in percentage markups (R. 28–29). Accordingly, the Director of Price Stabilization found "that the markups set forth in these regulations will produce generally fair and equitable prices" (R. 30).[4]

In view of the finding that the markups were fair and equitable at the time of the issuance of the regulation and the failure of petitioner to protest within six months of its effective date or to allege circumstances arising after the effective date which rendered the regulation no longer generally fair and equitable, the court below properly dismissed the complaint as based upon a protest filed out of time.

2. Petitioner also argues that the Defense Production Act was originally scheduled to expire on June 30, 1951; that Congress extended it to June 30, 1952;[5] that Congress thereby "reim-

[4] The conclusion to the regulations contains the following paragraph (R. 37):

"In formulating these regulations the Director of Price Stabilization has consulted extensively with industry representatives and has given full consideration to their recommendations. In his judgment the provisions of these regulations are generally fair and equitable and are necessary to effectuate the purposes of Title IV of the Defense Production Act of 1950."

[5] Congress first extended the Act for one month until July 31, 1952, P. L. 69, 82d Cong., 1st Sess., approved June 30, 1951. Congress later extended it for an additional eleven months to June 30, 1952. The Defense Production Act Amendment of 1951, P. L. 96, approved July 31, 1951.

posed" CPR 15 on petitioner and that the "re-imposition" of controls created a "new impact" on petitioner which constituted "new grounds" under Section 407 (a). What petitioner is saying, in effect, is that it held off filing a protest because it was confident that price controls would lapse. Because this hope was unrealized, petitioner claims that it now operates under a burden which it did not foresee and that the extension is therefore "new grounds" for a protest. This contention was fully answered by the court below (R. 58):

> * * * the fact is that the Defense Production Act of 1950 did not expire either on June 30, 1951 or July 31, 1951. On the contrary prior to its expiration on each of those dates it was amended by substituting the later expiration date. The act must, therefore, be regarded as one continuous statute remaining in force unchanged, except as amended, until its ultimate expiration. In other words, by virtue of the amendments the act did not terminate either on June 30, 1951 or July 31, 1951, but has continued in force from the time of its original enactment until the present day. It follows, therefore, that CPR 15 likewise continued in force by virtue of its original promulgation and was not reissued on June 30, 1951 or July 31, 1951 either impliedly or otherwise. The amendments of the act which postponed its expiration date accordingly did not affect the limitation upon protests contained in Section 407

(a) or operate to toll that period with respect to the complainant's protest.

Under any other construction, not only would the Defense Production Act extension in 1951 have reopened to protest all the regulations issued under the original 1950 Act, but all of the regulations issued to date would again be reopened to protest if Congress should again extend the Act.

In any event, this allegation of new grounds was not made the basis of the protest filed with the Office of Price Stabilization (after the extension of the Act) and under the terms of the Defense Production Act it cannot be urged in the courts. Section 408 (a).

CONCLUSION

For the reasons set forth above, we respectfully submit that the petition for a writ of certiorari should be denied.

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